

1
2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF NEVADA

4
5 Michael Moebius,) Criminal Case No.
6 Plaintiff,) 2:21-cv-00970-ART-VCF
7 vs.)
8 Tony Carnevale, et al,) Thursday, December 15, 2022
9 Defendants.)

10
11 TRANSCRIPT OF MOTION HEARING
12 HONORABLE ANNE R. TRAUM PRESIDING
13 UNITED STATES DISTRICT JUDGE

14 **A P P E A R A N C E S**

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25 Proceedings taken by Certified Stenographic Reporter and
transcribed using Computer-Assisted Translation

1 (Proceedings commenced at 10:09 a.m.)

2 THE CLERK: This is the date and time set for oral
3 arguments regarding the motion for summary judgment in Case
4 No. 2:21-cv-00970-ART-VCF. Michael Moebius v. Tony Carnevale,
5 et al.

6 Counsel, please state your appearances for the
7 record.

8 MR. RUSSELL: Reginald Russell, Bar Number 12275,
9 for plaintiff.

10 MR. MILTENBERGER: Good morning, Your Honor. Chris
11 Miltenberger on behalf Caesars Entertainment.

12 MR. DUNNING: Good morning. Jeff Dunning, also on
13 behalf Caesars Entertainment, Greenberg Traurig.

14 THE COURT: Good morning. Thank you, gentlemen.

15 Okay. So we're here on the defendants' motion for
16 summary judgment. Would you like to go first and I'll let you
17 argue for a few minutes, ask some questions, and then I'll
18 give you rebuttal time.

19 MR. DUNNING: Certainly, Your Honor. Thank you.
20 May I approach the lectern?

21 THE COURT: And you are Mr. Dunning?

22 MR. DUNNING: Yes.

23 THE COURT: Thank you. Go ahead.

24 MR. DUNNING: Yes, good morning. As noted,
25 Your Honor, we are here on the motion for summary judgment

1 filed by Caesars Entertainment. Caesars Entertainment is the
2 parent company of an entity named Desert Palace, Inc. Desert
3 Palace is the -- is an operating company which operates and
4 manages the Caesars Palace Hotel and Casino in Las Vegas.

5 Now, Desert Palace, during the relevant period,
6 leased a retail space within Caesars Palace to an entity named
7 Carnivale Gallery, which is the co-defendant in this case. I
8 should have said there are two co-defendants, Carnevale
9 Gallery and Mr. Carnevale in his personal capacity, but I'll
10 just refer to Carnevale Gallery as the co-defendant.

11 So the plaintiff alleges that Carnevale Gallery
12 committed copyright infringement by displaying a single art
13 work in which the plaintiff, Mr. Moebius, owns a copyright
14 that the plaintiff contends was an unauthorized reproduction
15 and, therefore, the display of that artwork constituted a
16 copyright infringement.

17 So, Your Honor may be wondering, why is Caesars
18 Entertainment here? And frankly, Your Honor, we've been
19 wondering the same thing for a year and a half now. The
20 reason we're here, at least for the pleadings, is that the
21 plaintiff has alleged a threadbare claim that Caesars
22 Entertainment is vicariously liable for the alleged
23 infringement that was committed by Carnevale Gallery of the
24 plaintiff's copyright.

25 Now, the plaintiff relies primarily on a Ninth

1 Circuit case, *Fonovisa v. Cherry Auction* which is readily --
2 effectively readily distinguishable from the facts in this
3 case.

4 But before I talk about the, you know, that case in
5 detail, the Ninth Circuit in that case stated that the
6 Copyright Act does not provide for liability on the part of
7 anyone except the direct infringer. The theory of vicarious
8 liability for a third party under copyright infringement
9 arises from the doctrine respondeat superior which holds that
10 an employer can be liable for infringing acts committed by an
11 employee.

12 So, over time, courts have extended that respondeat
13 superior doctrine to cover other cases. But as the *Fonovisa*
14 court itself stated, that document, vicarious liability,
15 really is only appropriate in a case where the defendant's
16 economic interests are intertwined with those of the direct
17 infringer. And that is, what we have in this case, is the
18 antitheses of that, Your Honor. We have a typical arms'
19 length commercial lease between the landlord and a lessee.

20 Now, you know, plaintiff's theory, it basically
21 amounts to strict liability for commercial landlords for
22 copyright infringement committed by a commercial tenant on the
23 landlord's property, which courts have repeatedly stated is
24 not the holding of *Fonovisa* and it's not -- it's a gross
25 overreach of what the *Fonovisa* court actually held.

1 Now, the analysis that the *Fonovisa* court went
2 through, the Court cited to an earlier Second Circuit case,
3 the *Shapiro* case, that basically drew a distinction between
4 two lines of cases dealing with vicarious liability. One they
5 referred to as the "landlord/tenant cases," and those were
6 cases where a landlord who lacked knowledge of the infringing
7 acts of the tenant and who exercised no control over the
8 tenant services was not liable for infringement by its tenant.

9 And then on the other extreme are what the *Shapiro*
10 court and the *Fonovisa* court referred to as the "dance hall
11 cases." Those are cases where an operator of a dance hall and
12 entertainment venue hired a band to perform, charged people
13 admission to come see the performance, and hired the band even
14 knowing or with indifference to the fact that the band was
15 committing copyright infringement by performing music --
16 copyrighted works without authorization. So in those cases,
17 the dance hall cases, the sole purpose for the business
18 enterprise operated by that defendant was to facilitate the
19 infringement, even if the defendant was not the one who
20 actually was the direct infringer.

21 And the *Fonovisa* case, which we should note -- first
22 of all, the *Fonovisa* case was a direct insufficiency of the
23 plaintiff's pleadings. It was a case on a motion to dismiss,
24 so it was not dealing with -- the Court did not actually find
25 liability in that case, all it found was that the plaintiff

1 had adequately stated a claim for vicarious liability on the
2 part of the defendant, which in that case, Cherry Auction, was
3 an operator of a swap meet, or a flea market as they're also
4 known, where they rent -- the defendant rented booths in a
5 building or a facility to individual vendors and people came
6 to buy goods from the vendors.

7 Again, you know, the sole purpose of the economic
8 enterprise there was to provide cheap goods for people to come
9 and buy who don't want to go to a department store and pay
10 higher prices; right? So the operator of the swap meet
11 clearly had a incentive to look the other way at the
12 infringement committed by the vendors.

13 THE COURT: Can I just -- I just want to ask you,
14 Desert -- you maintain that Desert Palace is in privity of
15 Carnevale. I mean, it's the landlord of the Gallery.

16 MR. DUNNING: That's correct, Your Honor. Yes.

17 THE COURT: So I'm trying to just understand the
18 relationship, the level of relationship between these three
19 actors. Because it seems that the plaintiff sued the Gallery
20 and it sued Caesars, but didn't sue the middleman, perhaps, or
21 the actual landlord, which is Desert Palace.

22 MR. DUNNING: Right.

23 THE COURT: But then there's some -- but I expect to
24 hear from plaintiff that plaintiff did not sue Caesars because
25 he thought Caesars was the landlord. And if I'm not -- if I'm

1 understanding some of the facts -- so this came out, they
2 learned this from your motion for summary judgment, and
3 then -- so I need you to address Caesars relationship with
4 Desert Palace and the role of Robert Morris who, I guess, is
5 the signatory to a lease agreement, or what I guess you call
6 the license. You call the license or the lease -- you call
7 the lease a license; right?

8 MR. DUNNING: Yeah, it's referred to as a license
9 agreement, but, in essence, a lease.

10 THE COURT: If you could address those. Thank you.

11 MR. DUNNING: Yes, Your Honor. You are correct that
12 there are basically two levels of -- basically there would
13 have to be vicarious liability on two levels for the Court to
14 find Caesars Entertainment to be liable here.

15 The first level is that Desert Palace, the landlord
16 that had the lease agreement -- that leased space to
17 Carnevale, the Court would have to find that Desert Palace was
18 vicariously liable for the acts of Carnevale. And then, as a
19 second inquiry, the Court would have to find that Caesars
20 Entertainment is vicariously liable as the parent company of
21 Desert Palace. So our position, Your Honor, is that that
22 second level, the Court doesn't even need to address that in
23 order to rule on this motion. Because if Desert Palace cannot
24 be vicariously liable for the acts of Carnivale, then, by
25 necessity, Caesars Entertainment, likewise, cannot be

1 vicariously liable as the parent of Desert Palace.

2 THE COURT: Well, I'm not looking -- at the moment
3 I'm not looking at whether Desert Palace is liable because --
4 or can be liable because they're not in the lawsuit and
5 haven't filed a motion for summary judgment. I'm trying to
6 understand the relationship between Caesars Palace and Desert
7 Palace -- Caesars Entertainment, pardon me, and Desert Palace.

8 MR. DUNNING: So our position on that, Your Honor,
9 is that that relationship is not material to the issue of
10 whether vicarious liability applies here, because, you know --
11 and you're correct, Desert Palace is not in the case. But I
12 would say Desert Palace is kind of in the position of while
13 not a necessary party, certainly, in order to address the
14 issue of liability here, it -- the Court has to look at both
15 of those levels; right?

16 And so, you know, the plaintiff tries to suggest
17 that there's a -- there are material factual disputes
18 regarding the relationship between Caesars Palace -- I'm
19 sorry, Caesars Entertainment and Desert Palace. Our position
20 is that regardless of whether there are factual disputes on
21 that issue, they're not material here. Because what the Court
22 really needs to look at is, is there -- and another way to
23 conceptualize this would say, let's find -- for purposes of
24 this motion, let's just say that Caesars Entertainment and
25 Desert Palace are one and the same. You know, legally we're

1 not conceding that, but for purposes of this motion we'll
2 accept that. Because our position is that Desert Palace, were
3 it a defendant, would not be vicariously liable for the acts
4 of Carnevale. And were it a defendant, it would be joining in
5 this motion for summary judgment. The plaintiff has chosen
6 not to name Desert Palace as a defendant. That's for reasons
7 that only plaintiff would know. I don't know what those are.
8 So I hope --

9 THE COURT: Isn't there an aspect of the lease --
10 well, is it true that Carnevale is paying rent to Caesars
11 Entertainment?

12 MR. DUNNING: During the relevant time, Carnivale
13 was paying rent like any other retail tenant would pay rent to
14 the landlord, that's correct.

15 THE COURT: I'm just asking, do they make a check
16 payable to Caesars Entertainment?

17 MR. DUNNING: I don't know as I stand here which --
18 who the check's made payable to.

19 THE COURT: Okay.

20 MR. DUNNING: But, again, our position would be
21 that's not a material fact to the issue before the --
22 currently before the Court.

23 THE COURT: I guess, isn't there -- there was --
24 could Caesars eject -- let's just say hypothetically, could
25 Caesars eject Carnevale?

1 MR. DUNNING: Well, so Desert Palace has the -- had
2 the contractual right as a -- as is typical in a commercial
3 lease to terminate the lease, that's correct. And, again --

4 THE COURT: And it can be terminated for any reason?

5 MR. DUNNING: I believe they were permitted to
6 terminate for any reason, yes.

7 THE COURT: And couldn't they terminate it for --
8 don't they have final say over the products that are sold at
9 Carnivale? Can't they sort of basically have a say over
10 you're not selling good products, we don't approve of the
11 products? Let's say, for example, it's an ice cream store,
12 and they start selling adult rated -- you know, things that
13 the mall doesn't want there. They can say, I'm sorry, but
14 we're ejecting you because we don't -- well, we don't approve
15 these products and with five days' notice we're ejecting you.

16 MR. DUNNING: Well, per the lease, there is language
17 in there that says Desert Palace has some -- has some ability
18 to monitor -- I don't remember the exact language -- monitor
19 or control what Carnivale sells. However, you know -- and we
20 don't dispute what the lease says. However, even accepting
21 that factually, the law on vicarious liability requires more
22 than that for a finding of the landlord to be vicariously
23 liable.

24 If you look at the *Fonovisa* case and the subsequent
25 *Adobe Systems* case from the Central District of California,

1 which really goes into more detail on why -- how the holding
2 of *Fonovisa* is not nearly as broad as plaintiff suggests, that
3 the standard as to what constitutes right and ability to
4 control for purposes of vicarious infringement is either, one,
5 there's a master/servant relationship; or, two, the defendant
6 is engaged in pervasive participation in the business
7 activities of the infringer. And that requires something more
8 than simply a commercial landlord that rents space, collects
9 rent, and insures that its tenant operates its business in a
10 lawful manner. That's not enough to rise to the level of
11 pervasive participation that the case law requires for a
12 finding of vicarious liability here.

13 In order for there to be pervasive participation,
14 there has to be actual participation in the business affairs
15 of the infringer. For instance, in the dance hall cases,
16 the -- you have a situation where the operator of the venue
17 hired the band, and hired the band for the express purpose of
18 performing music which was not authorized. And the swap meet
19 cases, like *Fonovisa*, you have, again, a situation where the
20 operator of the swap meet put all the vendors -- you know,
21 organized and brought in these vendors for the express purpose
22 of selling cheap goods, knockoff goods, without, you know,
23 any --

24 THE COURT: No, I understand what you're talking
25 about. The draw concept where the landlord is sort of in on

1 the attraction of whatever the infringement activity is. In
2 that way maybe it's, to a degree, sort of in on the business
3 model.

4 MR. DUNNING: Right. And that goes to the direct
5 financial benefit prong of the vicarious liability
6 three-factor test. And you're correct, Your Honor, that the
7 law is clear that the ability to purchase infringing products
8 has to be the primary draw for consumers to the venue.

9 For instance, if we look at the *Fonovisa* case, the
10 Ninth Circuit there said, well, there are clearly facts
11 alleged that show that this was the draw to the venue. There
12 was -- it was undisputed that most of the vendors there were
13 selling unlicensed recordings. There had been raids where
14 tens of thousands of products were seized. There had been
15 letters sent by the sheriff to the defendant. All of this,
16 you know, clearly showing that the reason people came to the
17 swap meet was because cheap, bootlegged tapes, basically.

18 THE COURT: So can I just go back to my question.
19 Can you just -- can you just fill in the gap about who is --
20 is Robert Morris an employee of Caesars Entertainment?

21 MR. DUNNING: That's my understanding, yes,
22 Your Honor.

23 THE COURT: And did he sign the license agreement?

24 MR. DUNNING: He did sign the license agreement.
25 Yes, that's correct.

1 THE COURT: And then you responded to the request
2 for production asking to identify the relationship between
3 Desert Palace and Caesars Entertainment.

4 MR. DUNNING: We have produced documentation
5 responsive to the plaintiff's request, yes.

6 But I would say, again, you know, Robert -- the role
7 of Robert Morris is -- our position -- is not material to the
8 issue before the Court because -- again, we don't dispute that
9 Caesars Entertainment is the parent of Desert Palace and that,
10 certainly, Caesars Entertainment has in that role some control
11 over Desert Palace. And for purposes of this motion, you
12 know, we're not -- you know, there's no need to address that
13 issue, in our opinion, Your Honor.

14 THE COURT: Okay. All right.

15 I think I'll hear from the plaintiff, then I'll come
16 back to you. Thank you.

17 MR. DUNNING: Thank you, Your Honor.

18 MR. RUSSELL: Good morning, Your Honor.

19 THE COURT: Go ahead, Mr. Russell.

20 MR. RUSSELL: So it is my understanding that this is
21 a motion for summary judgment. We're not here to prove up any
22 of the facts, as I understand it.

23 And regarding the motion for summary judgment, it's
24 my understanding the party is entitled to a motion for summary
25 judgment if the movant is able to show that there is no issue

1 as to any material fact and the movant is entitled to judgment
2 as a matter of law.

3 The moving party bears the burden of establishing
4 the absence of any genuine dispute of material fact with all
5 reasonable inferences drawn in the nonmovant's favor.

6 Here, it appears that defendant is attempting to
7 turn this standard on its head, as you just heard, by stating
8 that material factual disputes are not material here and that
9 Robert Morris's role and the extent of control that Caesars
10 exercised over Desert Palace and, by extension, its premises
11 and Carnivale Gallery is irrelevant.

12 It is our contention that in doing so Defendant
13 Caesars has failed to meet its burden because the evidence in
14 the record demonstrates that there are disputes of material
15 fact such as the extent to which Caesars exercised control
16 over Carnivale and benefited from the infringement.

17 THE COURT: Continue. So I'm listening, and I
18 just -- so it would be helpful if you detailed that a little
19 bit more. So how do you think -- what level of control do you
20 think Caesars had? And why is it relevant that Robert Morris
21 signed the agreement? And then, also, if you could address,
22 what is Carnevale's claim making checks payable to Caesars
23 Entertainment?

24 MR. RUSSELL: I can't address as to whether
25 Carnevale was making checks payable to Caesars, but that's

1 what it -- that's what they demanded.

2 THE COURT: Mm-hmm.

3 MR. RUSSELL: They actually directly intervened. So
4 that states that there's some level of control. And they
5 directed how the payment should be done. That's control. So
6 there you have right there a dispute of material facts. We
7 don't know the level of control. And that's an issue that
8 needs to be explored in discovery.

9 THE COURT: Okay. So what you need to show is the
10 right -- so maybe just sort of walk me through the test. To
11 establish vicarious liability of Caesars -- and I'm basing
12 this on the *Erickson* test from the Ninth Circuit from 2019.
13 You need to show the right and ability to supervise the
14 infringing conduct and a direct financial interest in the
15 infringing activity. So that may be a level of detail more
16 than just paying rent, so I just wanted you to -- I wanted you
17 to address those issues.

18 MR. RUSSELL: Right. So, first of all, you just
19 have to have the right and ability. You don't even have to
20 control. And that's something that defendant contends. They
21 contend that they didn't control anything. It doesn't seem
22 that way based on the facts. But the reality is you just have
23 to have the ability to have control.

24 THE COURT: And where do you find that ability?

25 MR. RUSSELL: In the contract.

1 THE COURT: Okay. In what, specifically?

2 MR. RUSSELL: In the contract it states that they
3 were able to terminate that contract. And it's based on the
4 question that you raised earlier, they were able to terminate
5 that contract for any reason whatsoever. And they also
6 required Carnevale Gallery to abide by its rules and
7 regulations. And so we contend, as a result, that Caesars,
8 through its subsidiary, and/or its subsidiary, had control
9 over Carnevale Gallery. Because they -- and it's a question
10 as to -- okay, and this is the issue with Robert Morris. Now
11 to have some kind of -- to have a high-level ranking executive
12 sign on behalf of Caesars for the contract, then that kind of
13 deflates defendants' argument that there is no control or even
14 that Caesars is not a party.

15 THE COURT: What have you learned about the
16 relationship between Desert Palace and Caesars?

17 MR. RUSSELL: At this point we haven't had any
18 additional discovery. You know, there hasn't -- we haven't
19 had a chance to have discovery, as you have read in the
20 pleadings. And as a result, at this juncture, it's my
21 understanding that we did have -- we did get some initial
22 responses. We're waiting on a document request, but we -- to
23 my knowledge, we have not received anything more than that.
24 And we haven't received a document request. And so no
25 additional -- no discovery has taken place.

1 THE COURT: So you don't understand at this moment
2 whether Desert Palace is actually separate from Caesars.

3 MR. RUSSELL: Exactly.

4 THE COURT: Okay.

5 MR. RUSSELL: That's exactly right.

6 And so one of the things that I did want to go over
7 that was mentioned earlier is that in *Shapiro*, when it
8 evaluated those two lines of cases, landlord/tenant and dance
9 hall cases, it determined that the relationship between that
10 store owner in that case and the concessionaire was closer to
11 the dance hall model than to the landlord/tenant model. It
12 imposed liability, even though the defendant was unaware of
13 the infringement, because the proprietor derives an obvious
14 and direct financial benefit from the infringement.

15 And *Gershwin* Publishing then went on to hold that
16 even in the absence of an employer/employee relationship one
17 may be vicariously liable if he has the right and ability to
18 supervise the infringing activity and also had a direct
19 financial interest in such activity.

20 So here, you can't say there's no financial benefit.
21 I mean, obviously, they -- Caesars and Carnevale Gallery, they
22 both engaged in heavily promoting this -- the plaintiff's
23 work.

24 THE COURT: How did they do that?

25 MR. RUSSELL: I don't know all the particulars, but

1 I know that, based on our pleadings, that's what we know and
2 allege, that they both engaged in the promotion. And they
3 would not have engaged in this heavy promotion if it was of no
4 benefit to them. And there indeed was a draw because it was
5 Moebius's fans who visited the premises and who noticed that
6 it was a fake, and who took a picture of it and notified the
7 plaintiff about it.

8 THE COURT: So I guess one question I have is -- I
9 don't know why Moebius terminated his relationship with
10 Caesars or how many works in the past he had sold there, but
11 it does seem to me that the model of Caesars is a little -- or
12 at least my sort of experience in going to a place like that
13 is a little different than a swap meet because the
14 entertainment value is walking -- is not buying art, it's
15 walking around and seeing art while you -- or seeing something
16 that's sort of eye-catching, possibly expensive. It's not
17 necessarily buying it.

18 MR. RUSSELL: I would agree. I agree. And I think
19 that the notoriety -- you can't -- you can't measure benefit
20 just in terms of monetary benefits. There's other benefits.
21 There's a draw. There's marketing. There's the notoriety.
22 There's the publicity. All of that goes into play to create a
23 draw. And we don't know to what extent there was a draw. I'm
24 going to be honest about that. We don't know. That's an
25 issue of material fact that needs to be drawn out in discovery

1 for us to determine that in a more concrete basis.

2 Now, defendant argues that there was no draw. So, I
3 mean, we have these two extremes here. On the one hand,
4 defendant is saying no control, no draw. On the other hand,
5 we are saying, okay, it may not be 100 percent control, and it
6 may not be 100 percent of a draw. It may have been a huge
7 draw. It may have been a small draw. We don't know. So
8 there are issues of material fact that need to be determined
9 and that are material to this case.

10 THE COURT: So just on another point. The lease --
11 I mean, the licensing agreement between Carnevale and Desert
12 Palace changed over a time so that at the time this is alleged
13 to have happened there was a flat-rate rent instead of a
14 percentage rent. Can you just address that sort of whether
15 you think the flat rate is relevant at all to the infringement
16 and the direct financial benefit of Desert Palace and Caesars
17 Entertainment.

18 MR. RUSSELL: Right. I don't think it's relevant.
19 Because it's not just -- you know, I don't believe that rent
20 alone, like if somebody was just paying rent and they didn't
21 know anything -- you know, the landlord didn't know anything
22 about the infringement, was not involved, was indeed an
23 absentee landlord, well, the cases don't hold them liable.
24 But, in this case, that's not the situation. I mean, we see
25 that Caesars was indeed active because they engaged in the

1 collection efforts, they sent written communication, and also
2 they signed the agreement. That's a huge thing right there.
3 But also --

4 THE COURT: They're active -- but that seems to be
5 that they're active in collecting rent and interacting with
6 people who -- like businesses who are renting, but it doesn't
7 necessarily connect them at all to the infringing activity and
8 the direct involvement in the --

9 MR. RUSSELL: Well, --

10 THE COURT: -- I mean, the level of connection
11 that's required to get to vicarious liability is pretty high,
12 and it can't just be, it seems, kind of an incidental
13 financial benefit but needs to be sort of more, sort of
14 directly connected to the infringing conduct.

15 MR. RUSSELL: Well, when we look at what *Fonovisa*
16 noted about *Gershwin*, they noted that *Gershwin* lacked a formal
17 contractual ability to control the direct infringer.
18 Nevertheless, because of the defendants' pervasive
19 participation there where there was no contractual agreement,
20 they held them liable.

21 THE COURT: Right. I'm not saying that I've seen it
22 in any facts here. We do have, perhaps -- we may have a
23 contractual relationship, depending on the relationship
24 between Desert Palace and Caesars. I -- you know, that has
25 not been established. But it seems like that is a

1 possibility, I suppose. But I have not heard a fact or a
2 piece of evidence that makes Caesars Palace directly involved
3 in that pervasive way that we're talking about to the
4 infringing conduct. What's that connection?

5 MR. RUSSELL: Yes, so that's why I'm seeking to kind
6 of distinguish that. Because here, *Gershwin*, they required
7 that in view of a lack of a formal contractual ability to
8 control. So then they found control through the pervasive
9 activity and participation.

10 THE COURT: Right. So what --

11 MR. RUSSELL: But here we have a contractual
12 agreement.

13 THE COURT: Oh, I see. You're saying in lieu of
14 pervasive activity, we have a contractual agreement.

15 MR. RUSSELL: Yes. We have a contractual agreement
16 here that gives them control, and substantial control.

17 THE COURT: Because they can -- if they were to get
18 a phone call saying I think that there's a fake on display in
19 your mall, they could say you're out.

20 MR. RUSSELL: Yeah.

21 THE COURT: Here's your five days' notice, good-bye.

22 MR. RUSSELL: Yeah, and they would have to pack it
23 up.

24 THE COURT: So there's no indication that they --
25 that they were in the know in that way. As much as you know

1 about this case, that they had been alerted and then kind of
2 failed to act in which case they sort of participated in the
3 infringement in that way.

4 MR. RUSSELL: Right. So what I would say to that
5 is, first of all, I don't think it's undisputed. We don't
6 know.

7 THE COURT: Okay.

8 MR. RUSSELL: We need to do discovery. We don't
9 know what happened. And so we need to continue with
10 discovery. But not only that, we -- we -- let's see here. I
11 think I have something that kind of -- so because this is a
12 strict liability regime, whether Defendant Caesars was -- had
13 knowledge or had intent or their state of mind, any of that,
14 is just irrelevant. And we're not required to show that or
15 prove that under that -- under copyright infringement as it is
16 strict liability. And that's why you have that ability to
17 control.

18 THE COURT: Can you tell me a little bit about -- so
19 I understand -- my understanding, correct me if I'm wrong, is
20 that the parties sort of informally agreed to not move forward
21 with discovery when the motion to -- I mean, earlier, and that
22 now discovery is ongoing as you close in January; is that
23 correct?

24 MR. RUSSELL: Excuse me, one moment.

25 I'm still getting over a cold. I'm so sorry.

1 It's my understanding that we did agree to a stay,
2 and so nothing was done. And we didn't -- oh, and to answer
3 your question from earlier, when the motion for summary
4 judgment was filed, we didn't know anything about Robert
5 Morris or Desert Palace until the actual motion for summary
6 judgment, none of that information was disclosed prior to, so.
7 And, in addition, as far as the motion for summary judgment is
8 concerned --

9 THE COURT: So let me stop you there.

10 Is it your position that it should have been
11 disclosed earlier in response to initial disclosure?

12 MR. RUSSELL: I believe so, yes. Because they knew
13 this action was pending. You know, I would have expected them
14 to disclose that in their initial disclosures. I mean, it
15 seems like -- I don't know why it wasn't disclosed. I can't
16 speculate as to that. But it seems like there was some
17 gamesmanship there.

18 THE COURT: Okay. So tell me more about discovery
19 in terms of where you are.

20 MR. RUSSELL: In terms of discovery, nothing has
21 happened since the initial disclosures. The -- because
22 immediately after this motion for summary judgment was filed,
23 and we haven't, like I said, nothing has progressed since
24 then.

25 THE COURT: Did you get responses to your request

1 for production?

2 MR. RUSSELL: I believe that we did get some initial
3 responses, but I don't think that we've got the documents yet.
4 Because last I checked we were still waiting on that.

5 THE COURT: Okay.

6 MR. RUSSELL: So -- and I haven't gotten any
7 since -- I think this was since the beginning of this week, no
8 update was provided to me as to that.

9 THE COURT: Okay. And so -- and when will
10 discovery -- what is your estimation of the time of discovery?
11 How long that would take and what do you hope to find out
12 relative to the showing what you need to show?

13 MR. RUSSELL: You have very hard questions,
14 Your Honor. I appreciate that question. I don't know as far
15 as the timeline. I don't know what we might expect going
16 forward as to how long we need to engage in discovery. But I
17 do know some of the things that we hope to come out of that,
18 and one of the things is the things -- well, a big part is
19 what we're discussing today, really, that level of control.
20 Was Caesars actually a party? How -- what was their level of
21 involvement with Carnevale Gallery? What level of control did
22 they actually exercise? And also the financial benefit.
23 Because at this point we can't determine how much of a draw
24 there was. We believe there was a draw based on the facts,
25 you know. And like I mentioned to you, it was Moebius's fans

1 that had visited Caesars and saw Moebius's work and was the
2 one that alerted it -- alerted that to Moebius.

3 And also, you know, just his status as an
4 international artist. I mean, he's world renown. So there
5 definitely was some draw. And the promotion that they engaged
6 in, you know, to promote his work. And I don't think that
7 they would have done a copy of it if there was no draw, there
8 was no impetus. I mean, there's a considerable amount of
9 resources to engage in that.

10 So we want to get -- you know, we want to engage in
11 discovery so we can get to the bottom of that.

12 THE COURT: Okay. Thank you.

13 MR. RUSSELL: Thank you, Your Honor.

14 THE COURT: So Mr. Dunning, you can come up briefly,
15 but then I will --

16 MR. DUNNING: Thank you. May I approach,
17 Your Honor?

18 Okay. I'll just try to quickly address several of
19 Mr. Russell's points. Plaintiff's counsel on multiple
20 occasions misstates or ignores the applicable law to the
21 question before the Court. First of all, plaintiff's counsel
22 just stood up here and said this is a strict liability regime.
23 And that's incorrect. If you're looking at a liability of a
24 direct infringer, that is correct. That is patently incorrect
25 with regard to the issue of vicarious liability.

1 *Fonovisa* doesn't say that. There's not a single
2 case that says that.

3 And if you look at the *Adobe Systems* case which
4 applied and distinguished *Fonovisa*, according to that case,
5 said, virtually all commercial landlords or trade show
6 operators derive a direct financial benefit from the rest of
7 the tenants or from the booth fees of vendors, as well as from
8 the revenues associated with the services provided to
9 consumers at the venue, such as parking and concessions.
10 Strict liability for this entire class of commercial landlords
11 cannot be the lesson of *Fonovisa*.

12 But that's the argument the plaintiff is making and
13 that is completely contrary to the law.

14 Also, plaintiff contends that a contractual right of
15 a landlord to exert some control over its tenant in the form
16 of a right to terminate is sufficient to qualify a landlord
17 for vicarious liability. Again, that's incorrect. As this
18 Court notes, there has to be some form of pervasive
19 participation. And, again, there's not a single case that
20 stands for that proposition that simply having a right -- a
21 landlord having a right to terminate a tenant is sufficient
22 right and ability to control to subject the landlord to
23 vicarious liability. There's not a single case that says
24 that, Your Honor.

25 And then with regard to whether there was a draw for

1 consumers to visit the venue to purchase infringing goods,
2 again, you know, plaintiff is misstating the law there. It --
3 there may be a draw for consumers who want to purchase
4 legitimate Michael Moebius art works. That's the reason why
5 Carnevale would have the -- would agree to sell them in the
6 first place, because he thinks consumers want to buy them.
7 That's not the standard, Your Honor. The standard is whether
8 there is a draw for consumers to visit a venue to purchase
9 infringing products. The presence of the infringing goods has
10 to be what draws consumers to the venue. And there's no
11 evidence in the record of that. And the Court understands
12 that people are not -- consumers are not going in to Caesars
13 Palace because they think they're going to get cheap
14 counterfeit art works or Gucci bags or whatever. There's no
15 evidence of that.

16 Plaintiff suggests that he needs discovery on this
17 issue. You know, it's plaintiff's burden to point to some
18 evidence to -- that would establish it to be an issue. In
19 fact, if plaintiff believes they need discovery for that,
20 well, Rule 56(d) lays out procedures the plaintiff must
21 follow. And plaintiff has to establish by affidavit what
22 facts they seek and how those facts would be material to the
23 issue before the Court. They've done -- the plaintiff has
24 done none of that because those facts don't exist, Your Honor.
25 There are no facts that would show that Caesars Palace -- or,

1 excuse me, that the activities of Caesars Entertainment or
2 Desert Palace would give rise -- that there's any facts that
3 would give rise to a draw to consumers to come to Caesars
4 Palace to purchase infringing art. It doesn't exist. That's
5 why we haven't seen any requests from -- or any -- any proper
6 Rule 56(d) request from the plaintiff for discovery.

7 And finally, Your Honor, with regard to Robert
8 Morris and the relationship between Caesars Entertainment and
9 Desert Palace, this is -- we know as a straw man, Your Honor.
10 As I mentioned earlier, our position is, even if the Court
11 assumes that Caesars Entertainment and Desert Palace are the
12 same entity, we still -- summary judgment is still appropriate
13 to Caesars Entertainment or Desert Palace. It seems like
14 plaintiff made a strategic decision not to name Desert Palace
15 as the defendant so they could set up this straw man argument,
16 Your Honor. That's all it is. What role Robert Morris plays
17 here, I can't tell you what that is, but it's not material to
18 the issue before the Court as to whether the Desert Palace or
19 Caesars Entertainment, assuming -- again, we'll assume they're
20 one and the same for purposes of this motion -- satisfies
21 their requirements for vicarious liability under the law for
22 the alleged infringement committed by Mr. Carnevale.

23 And last point, the allegation here is that the
24 infringement was one art work displayed in the gallery on one
25 occasion. Contrast that with the allegations in *Fonovisa*, you

1 know, thousands upon thousands of counterfeit goods sold by
2 many, many vendors at the swap meet. Contrast that with even
3 *Adobe Systems* where the Court found a swap meet operator
4 was -- or a computer fair operator was not vicariously liable.
5 Even though there were multiple vendors that sold infringing
6 products, there was no dispute as to that. And the Court said
7 in that case, I believe it was less than two percent of the
8 vendors were found to sell infringing product, and that was
9 less than 1 percent of the sales. That was not enough, even
10 with demonstrated admitted infringement, to rise to the level
11 of pervasive participation that's required here.

12 So with that, Your Honor, thank you for your time.
13 And unless you have any other questions, I will wrap up.

14 THE COURT: Thank you.

15 MR. DUNNING: Thank you.

16 THE COURT: So here's what I -- where I am. I do
17 recognize that the standard for vicarious liability is very,
18 very high. I'm basing that on *Fonovisa* and *Adobe*, and then
19 the Ninth Circuit decision in *Erickson*. All of those cases
20 come up in a slightly different posture in terms of motion to
21 dismiss. And *Erickson*, I believe, was after a trial. I'm
22 just looking at the legal standard in that particular context.
23 But the standard is really high, and I'm not sure, based on
24 what I've seen, that I've seen anything that shows that the
25 plaintiff is on route to meeting that standard.

1 I say that, but at the same time I am -- summary
2 judgment is final once it's done, and there are sort of a few
3 procedural sort of shortcomings here. Plaintiff notice, one,
4 which is the failure to sort of state which facts are not
5 contested. Defendant has noted -- the movant has noted that
6 plaintiff has not really set forth in an affidavit the facts
7 that plaintiff will discover in order to genuinely contest and
8 show that the issues of fact are disputed.

9 So I guess from what I've seen, I think that this is
10 going to be maybe an impossible hill to climb for the
11 plaintiff. But I also feel that the motion is premature at
12 this moment.

13 So, unfortunately, that -- of course, it's
14 defendants' right to move promptly for summary judgment based
15 on defendants' sort of well-founded theory that there is not
16 enough here to show that Caesars Entertainment can be found
17 vicariously liable. But given that the parties stopped
18 discovery and had not genuinely started it and discovery is
19 still open, and summary judgment is final once it's entered,
20 it's a real judgment, I do believe that it's premature at this
21 moment. So I think I'm -- would -- I'm going to deny the
22 motion for summary judgment today without prejudice because it
23 can be renewed at the conclusion of discovery.

24 So once discovery is closed, I anticipate seeing
25 that motion again. But I do feel that there are some genuine

1 issues of fact that I don't want to minimize, and one of those
2 is there -- I appreciate that Caesars Entertainment is saying
3 whatever the relationship between Desert Palace and Caesars
4 Entertainment, we are nowhere near the level of pervasive
5 engagement. Direct contact in the infringing activity that
6 we've seen, that's the level that's been required in the case
7 law. I tend to agree with that. But I think it's perhaps too
8 dangerous to just assume that that relationship doesn't matter
9 or that they are one and the same because it's unclear to me
10 what the facts surrounding that relationship are. And I don't
11 want to presume anything without sort of certainly knowing a
12 little bit more about -- or having plaintiff be able to point
13 to evidence that might be helpful in terms of understanding
14 the contract and the direct control over -- the direct
15 financial interest and the direct control to the infringing
16 conduct if there is -- if that relationship can be
17 established.

18 So I do believe it's premature to grant summary
19 judgment. But I do want to tell plaintiff, this is a really
20 hard claim to prove up based on the case law, which sets a
21 very high -- I mean, it seems what I've heard from Caesars is
22 correct and that there is a high showing that's required for
23 that vicarious liability. And it's really that connection,
24 financial interest and control and the draw. It's not just
25 sort of on a general business model, but connected to the

1 infringing conduct which is to my mind what is -- I'm not
2 really being factually here, but maybe that can be -- maybe
3 there is going to be able to come to light in discovery that
4 will illuminate it.

5 So with that, I'm going to deny the motion for
6 summary judgment without prejudice. It can be renewed once
7 the discovery is closed. And then I will just advise both of
8 you if we are back again with that motion to be by the book in
9 terms of both detailing undisputed issues of fact so that
10 they're clear. That makes it much easier for the Court and
11 the other side to contest and really, you know, identify what
12 is contested. And then, also, plaintiff, that once discovery
13 is closed, the facts are the facts based on whatever you've
14 been able to discover, and we'll go from there.

15 Thank you for your time.

16 MR. RUSSELL: Thank you, Your Honor.

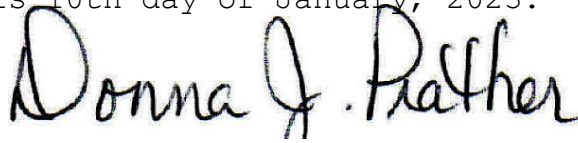
17 MR. DUNNING: Thank you, Your Honor.

18 (Proceedings concluded at 11:06 a.m.)
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REPORTER'S CERTIFICATE

I, DONNA J. PRATHER, do hereby certify that the above and foregoing, consisting of the preceding 32 pages, constitutes a true and accurate transcript of my stenographic notes and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 10th day of January, 2023.

A handwritten signature in black ink that reads "Donna J. Prather". The signature is written in a cursive, flowing style.

DONNA J. PRATHER, RMR, CRR, CCP, CBC
Federal Official Court Reporter